

commencing with the customer's first meter reading taken on or after April 1"¹ unreasonably discriminates against commercial customers and is against the public interest.

Moving for dismissal of the complaint, ULH&P argues that Fidelity's complaint "seeks to retroactively change ULH&P's rates."² It argues that the Commission established Rate IT in Case No. 92-346³ and that any challenge to the eligibility provisions of Rate II should have been raised in that proceeding or when Fidelity first applied to ULH&P for natural gas service. Having failed to raise such objections at that time, ULH&P further argues, Fidelity is now estopped from contending that the eligibility provisions are unreasonable. To change those provisions at this juncture, ULH&P asserts, constitutes retroactive rate-making.

The Commission finds no merit to ULH&P's argument. KRS 278.260(1) permits a person to file a written complaint against a utility regarding a rate "in which the complainant is directly interested." It does not limit that right to utility rates not previously subject to prior Commission review. Since the Commission reviews every rate contained in a utility's filed rate schedules before approving it or permitting it to become effective, ULH&P's interpretation, if accepted, would strip a customer of any right to make a written complaint about an existing rate. Such a result is contrary to the statute's language and intent.

¹ ULH&P's Rates, Rules and Regulations for Furnishing Gas Service, KY. P.S.C. Gas No. 5, Sheet No. 50.2.

² ULH&P's Motion to Dismiss at 6.

³ Case No. 92-346, The Application of Union Light, Heat and Power Company for An Adjustment of Rates (Aug. 31, 1993).

We further find no merit to ULH&P's claim of estoppel. Fidelity was not a participant in Case No. 92-346. The pleadings suggest that Fidelity was not even a ULH&P customer when the Commission approved Rate IT. Moreover, ULH&P has presented no legal authority to support its argument that a customer's failure to object or protest the rate when applying for utility service precludes that customer from subsequently asserting that an existing rate or condition of service is unreasonable or unlawful.

Finally, we find nothing in Fidelity's complaint to suggest that the requested relief violates the rule against retroactive rate-making. Fidelity does not seek retroactive changes to ULH&P's Rate IT; it seeks prospective changes only. Contrary to ULH&P's assertion, changing the provisions of rates approved in a prior rate proceeding does not constitute retroactive rate-making.

Having considered the motion and the response and being otherwise sufficiently advised, the Commission finds that ULH&P's motion should be dismissed and that a procedural schedule should be established in this matter.

IT IS THEREFORE ORDERED that:

1. ULH&P's Motion to Dismiss is denied.
2. A formal hearing in this matter shall be held on May 31, 2000 at 9:00 a.m., Eastern Daylight Time, in Hearing Room 2 of the Commission's offices at 211 Sower Boulevard, Frankfort, Kentucky, and continuing until completed.
3. Each party may, on or before March 17, 2000, serve upon any other party an initial request for production of documents and written interrogatories to be answered by the party served within 14 days of service.

4. Each party may, on or before March 31, 2000, serve upon any other party a supplemental request for production of documents and written interrogatories to be answered by the party served within 14 days of service.

5. Each party may, on or before April 14, 2000, serve upon any other party a written request for admission, for purposes of this proceeding only, of the truth of any matter relevant to this proceeding set forth in the request that relates to statements or opinions of fact or of the application of law to fact. The matter is admitted unless, within 14 days after service of the request, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection. The form of the request for admission and the answer or objection thereto shall otherwise be governed by Kentucky Civil Rule 36.

6. Each party may, on or before April 14, 2000, take the testimony of any person by deposition upon oral examination pursuant to notice or by agreement.

7. On or before May 12, 2000, each party shall file with the Commission in verified form the direct testimony of each witness that it expects to call at the formal hearing.

8. On or before May 24, 2000, each party shall file with the Commission in verified form the testimony of each rebuttal witness that it expects to call at the formal hearing.

9. Direct examination of witnesses shall be limited to the authentication and adoption of that written testimony. No summarization of written testimony by the witness shall be permitted.

10. Witnesses who have filed written direct and rebuttal testimony shall present that testimony at the same sitting. Opposing parties may cross-examine such witnesses on both direct and rebuttal testimonies.

11. No opening statements shall be made at the hearing in this matter.

12. Any party may, within 15 days of the filing of the hearing transcript with the Commission, submit a written brief. Briefs shall not exceed 25 pages in length.

13. Copies of all documents served upon any party shall be served on all other parties and filed with the Commission.

14. Motions for extensions of time with respect to the schedule herein shall be made in writing and will be granted only upon a showing of good cause.

15. To be timely filed with the Commission, a document must be received by the Secretary of the Commission within the specified time for filing except that any document shall be deemed timely filed if it has been transmitted by United States express mail, or by other recognized mail carriers, with the date the transmitting agency received said document from the sender noted by the transmitting agency on the outside of the container used for transmitting, within the time allowed for filing.

16. Service of any document or pleading shall be made in accordance with Administrative Regulation 807 KAR 5:001, Section 3(7), and Kentucky Civil Rule 5.02.

17. As the Complainant bears the burden of proof in this matter, its failure to appear at the formal hearing and to present proof in support of its complaint may result in the dismissal of its complaint with prejudice.

18. The failure of Defendant to appear at the formal hearing may result in the entry of an Order granting the Complainant's requested relief.

Done at Frankfort, Kentucky, this 25th day of February, 2000.

By the Commission

ATTEST:

Executive Director